ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-904

	Opinion Delivered March 4, 2009
KEITH E. IRONS APPELLANT	APPEAL FROM THE DESHA COUNTY CIRCUIT COURT [NO. CV-2006-192-3]
V.	HONORABLE DON GLOVER, JUDGE
ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from the circuit court's review of an administrative challenge to suspension of appellant's driver's license for driving while intoxicated. Appellant argued below that the requirements of Ark. Code Ann. § 5-65-402(a)(8)(F)(i) (Supp. 2007) applied to the circuit court's review, and that the case should be dismissed because those requirements had not been met. Appellant makes the same argument on appeal. We affirm.

Arkansas Code Annotated section 5-65-402(a)(8)(F)(i) provides, in pertinent part, that:

> If the revocation, suspension, disqualification, or denial is based upon a chemical test result indicating that the arrested person was intoxicated or impaired and a sworn report from the arresting law enforcement officer, the scope of the hearing shall also cover the issues as to whether:
>
> (*a*) The arrested person was advised that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the chemical test result reflected an alcohol concentration equal to or in excess of the amount by weight of blood provided by law or the presence of other intoxicating substances;

> (*b*) The breath, blood, or urine specimen was obtained from the arrested person within the established and certified criteria of the Division of Health of the Department of Health and Human Services;
>
> (*c*) The chemical testing procedure used was in accordance with existing rules; and
>
> (*d*) The chemical test result in fact reflects an alcohol concentration, the presence of other intoxicating substances, or a combination of alcohol concentration or other intoxicating substance.

Appellant argues that the circuit court erred because, in the circuit court proceeding, there was no evidence regarding these issues, particularly the requirement of a showing that appellant was advised of the consequences of failing the chemical test. We find no error. By its express provision, section 5-65-402(a)(8)(F)(i) applies *only* to the administrative hearing itself, *not* to judicial review thereof. *See* Ark. Code Ann. § 5-65-402(a)(8)(A). The method by which the circuit court *reviews* the administrative decision is governed by section 5-65-402(c)(4)(A), which provides that:

> (4)(A) On review, the circuit court shall hear the case de novo in order to determine based on a preponderance of the evidence whether a ground exists for revocation, suspension, disqualification, or denial of the person's privilege to drive.
>
> (B) If the results of a chemical test of blood, breath, or urine are used as evidence in the suspension, revocation, or disqualification of the person's privilege to drive, then the provisions of § 5-65-206 shall apply in the circuit court proceeding.

Thus, use of a chemical test on review in circuit court is not governed by section 5-65-402(a)(8)(F)(i), but instead by section 5-65-206 (Supp. 2007), which provides that:

(a) In any criminal prosecution of a person charged with the offense of driving while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration of four-hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration in excess of four-hundredths (0.04) but less than eight-hundredths (0.08) by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) The provisions in subsection (a) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) Except as provided in subsection (e) of this section, a record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure when duly attested to by the Director of the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services or his or her assistant, in the form of an original signature or by certification of a copy.

(B) These documents are self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena given ten (10) days prior to the date of hearing or trial, in which case the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

(e) When a chemical analysis of a defendant's blood, urine, or other bodily substance is made by the State Crime Laboratory for the purpose of ascertaining the presence of one (1) or more controlled substances or any intoxicant, other than alcohol, in any criminal prosecution under § 5-65-103, § 5-65-303, or § 5-10-105, the provisions of § 12-12-313 govern the admissibility of the chemical analysis into evidence rather than the provisions of this section.

Appellant based his motion to dismiss in the circuit court hearing expressly upon section 5-65-402(a)(8)(F)(i). Because that section is inapplicable in judicial review of the administrative hearing, the circuit court did not err in refusing to comply with its requirements.

Affirmed.

GRUBER and BAKER, JJ., agree.